

# Chapter 5

## Hiring Employees

*At some point, most businesses are faced with the need to hire employees. This chapter provides an overview of what is involved in hiring and paying employees.*

As you may have already surmised, starting and operating a business involves a lot of paperwork. Hiring employees (or being a corporation with you as the only employee) multiplies the amount of paperwork you must complete.

Before you actually hire, we recommended that you consult with your accountant or with an employer service representative at your local One Stop Career Center (former "Job Service Office"). A great deal of information can be found on the [Missouri WORKS!](http://Missouri.WORKS!) web site or at: [www.dolir.state.mo.us/Resource.pdf](http://www.dolir.state.mo.us/Resource.pdf).

You will also want to obtain a "Business Tax Kit" and a copy of "Circular E, Employer's Tax Guide" from your local IRS office or call 1-800-829-3676. You may visit their website at [www.irs.gov/pub/irs-pdf/p15.pdf](http://www.irs.gov/pub/irs-pdf/p15.pdf). "Circular E" explains federal tax withholding and Social Security tax requirements for employers as well as containing up-to-date withholding tables for you to use to determine how much federal income tax and Social Security tax is to be withheld from each employee's paycheck.

### TIPS ON HIRING

#### What Is Involved?

Once you begin paying salary or wages to employees, you must collect taxes from your employees. The primary taxes are: income taxes and Social Security (FICA). If you have not already done so, you must apply for a federal employer identification number (EIN) -- Form SS-4. This number is used to identify your business on payroll and income tax returns, as well as for other federal tax purposes. Occasionally you will encounter a financial institution that will require an EIN to open a business account. Corporations and partnerships must file Form SS-4 even if they have no employees.

#### Assistance to Employers

The Missouri Department of Economic Development's Division of Workforce Development offers employment services and other assistance to employers and employees. The statewide network of One Stop Career Centers provides a complete labor exchange that includes a computerized Job Bank, applicant recruitment, selection and referral, labor market information, latest placement methods, testing and other assisted serves. [Missouri WORKS!](http://Missouri.WORKS!) provides the latest information pertaining to employment opportunities in Missouri as well as information on labor, employment, education / training, labor market information, and other programs and services related to employment and training. Contact your local One Stop Career Center for more information.

#### Who Are Employees?

Not all individuals who perform services for your business will necessarily be employees. The determination of whether an individual is an employee or independent contractor for tax purposes is important for several reasons. Wages paid to employees generally are subject to employment taxes imposed under state and federal law. Only compensation paid to employees is used to calculate benefits.

An "employee status determination" is made according to three tests:

**Test 1:** provides that an officer or a corporation is an employee of the corporation. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives, nor is entitled to receive, directly or indirectly, any remuneration for serving as an officer is not considered to be an employee of the corporation.

**Test 2:** provides that the usual common-law rules are used in determining whether an individual is an employee. An individual is an employee under the common-law control test when the individual is subject to control by the person for whom the services are rendered as to the way the work is done -- i.e., control over when, where and how the work is done. The control need not be actually exercised for an employer-employee relationship to exist; the right to exert such control is enough.

Test 2 is often referred to as "The Twenty Factors" in determining independent contractor status. If an individual does not qualify as an employee under Test 1 or Test 2, a third test is applied.

**Test 3:** provides coverage to all workers who are covered by the federal employment law. The federal employment law also covers, as employees, individuals in four occupational groups who are not employees under the common-law rules but who perform services under certain specific circumstances.

The following workers, who may not otherwise qualify as employees under the common-law rules, are required to be provided Missouri unemployment coverage:

- a. agent-driver or commission-driver engaged in distributing food products (other than milk), laundry or dry cleaning services for his principal;
- b. traveling or city salesman engaged in the solicitation of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments concerning merchandise for resale or supplies for use in their business operations.

A worker may qualify as an employee under Test 3 if, in addition to meeting the specific requirements for the particular occupation, all of the following conditions are met:

- a. the worker is a member of one of the designated occupational groups;
- b. the contract contemplates that the worker perform substantially all of the services personally;
- c. the worker has no substantial investment in facilities for doing the work; and
- d. the services are performed in a continuing relationship; are not in the nature of a single transaction.

The *contract of service* under which the work is done may be oral or written or an informal arrangement.

The *contract of work* must contemplate that the worker performs substantially all the work. The important thing is not whether the worker delegates part of the work to another but rather whether the worker has the authority under the contract to do so. Mutual intent of the parties governs. A contract that contemplates the hiring of another will not affect the personal service requirement if the services delegated are merely incidental to the primary activity undertaken.

Whether a *substantial investment* is made by the worker depends on:

- the value of the worker's investment compared to the total investment;
- whether the facilities furnished are essential for the work or for the convenience of the worker;
- whether the worker is purchasing or leasing space from the person for whom the work is performed; and
- whether the facilities furnished by the worker are considerably more extensive than those usually furnished by other workers performing comparable services.

Facilities include such items as office furniture, fixtures, premises, tools and machinery. Facilities do not include education, training, good will, tools or other items commonly provided by employees or the worker's own vehicle for personal transportation.

A continuing work relationship exists if the work is regular or frequently recurring. A single job transaction, even though it covers a considerable period of time, is not generally considered performed in a continuing relationship.

As a general rule, someone who is performing service as an employee cannot be self-employed with respect to the same service. However, under certain conditions set forth in the Act and as noted above, service may be deemed to be performed as self-employment. Affected persons are U.S. citizens in the employ of foreign governments, ministers and members of religious orders, crews on fishing boats, newspaper vendors, real estate agents and direct sellers. If these persons meet conditions for deeming their services to be self-employed, it is unnecessary to consider their status as employees.

Although a person may be an employee under one or more of the above tests, the services may be exempted from employment by special provisions. For more information, see Sections 288.032-288.036 of RSMo.

### **Contract Employees/Independent Contractors**

Individuals who do work for you may be classified into one of four categories of service providers:

- employees
- independent contractors
- statutory employees
- non-statutory employees

You, the hiring company, are the service recipient. That is, you receive the service or product and you pay to have that service or product provided to you.

Your responsibility for payment of state and federal taxes, social security (FICA), unemployment tax, and employee benefits depends on which of the four categories the workers fall under. Many companies, small and large, would prefer to hire some, or even all, of their workers as "independent contractors." When an independent contractor provides a service or product, the service recipient does not have to withhold employment taxes, pay social security taxes (FICA), or pay unemployment tax.

Independent contractors are considered self-employed. As such, they are responsible for reporting their income and paying the appropriate state and federal taxes. The hiring company is not required to pay benefits or worry about minimum wage regulations. All the hiring company must do is file federal income tax form 1099 at the end of the year. The 1099 is a federal tax form stating the amount paid to independent contractors by the company during that year. In addition to the savings in tax, companies hiring independent contractors save the cost of the bookkeeping associated with those taxes.

The category into which the workers fit, however, is determined by the conditions under which they work and the kind of work they do. You may not simply select a category and define them as you desire. Choosing the correct categories for the people who do work for you may be critical to the continuation of your business. The status of workers depends not on what the workers or the service recipients want, but on what work is provided and under what conditions.

The Internal Revenue Service (IRS), as part of its program to collect the maximum amount of tax owed, has begun to investigate and prosecute cases where individuals are classified as independent contractors.

The list that follows gives 20 factors or "tests" used by the IRS when determining whether a person is an employee or an independent contractor. The question of "who controls the details?" appears to be the primary basis on which the determination is made.

No single factor or small group of factors can be taken as conclusive evidence of the presence or absence of control. To determine a worker's status, all the factors must be evaluated. The weight given to the individual factors is not equal, and some factors may not apply to certain occupations. Obtaining determination as an independent contractor can be very difficult. These twenty factors show control over details of work must be weighed against or compared to those that point to an independent contractor status. The main factors to be considered in determining control are as follows:

1. **Actual instruction or direction of worker.** A worker who is required to comply with instructions about when, where and how to work is ordinarily an employee. The instructions may be in the form of manuals or written procedures that show how the desired result is to be accomplished.
2. **Training** of a worker by an experienced employee working with him by correspondence, by required attendance at meetings and by other methods is a factor indicating control by the employer over the particular method of performance. This is especially true if the training is given periodically or at frequent intervals. An independent contractor ordinarily uses his own methods and receives no training from the purchaser of the services.
3. **Integration of the person's services** in the business operations generally shows that he is subject to direction and control. When the success or continuation of a business depends to an appreciable degree on the performance of certain kinds of services, the people who perform those services must necessarily be subject to a certain amount of control by the owner of the business.
4. **If the services must be rendered personally**, it indicates an interest in the methods, as well as the results. Lack of control may be indicated when the person has the right to hire a substitute with the permission or knowledge of the employer.
5. **Hiring, supervising, and payments to assistants** on the same job as the worker generally show employer control over the job. Sometimes one worker may hire, supervise and pay the other

workers. If this is done under a contract requiring that the worker furnish materials and labor and under which he is responsible only for the attainment of a result, the worker is an independent contractor. On the other hand, if he does so at the direction of the employer, he may be acting as an employee in the capacity of a foreman for or representative of the employer.

6. **The existence of a continuing relationship** between an individual and the person for whom he performs services tends to indicate an employer-employee relationship. If the arrangement contemplates continuing or recurring work, the relationship is considered permanent, even if the services are rendered on a part-time basis, they are seasonal in nature or the person actually works for only a short time.

7. The **establishment of set hours of work** by the employer bars the worker from being master of his own time, which is the right of the independent contractor.

8. **Full-time work** for the business is indicative of control by the employer since it restricts the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when, and for whom, he chooses. Although not specified, full-time work may be required. For example, setting a quota which requires all his working time or denying him the right to work for anyone else may indicate full-time employment.

9. **Doing the work on the employer's premises** implies employer control, especially where the work is of such a nature that it could be done elsewhere. The use of desk space and of telephone and stenographic services provided by an employer places the worker within the employer's direction and supervision unless the worker has the option as to whether he wants to use the facilities. However, the fact that work is done off the premises does not always indicate freedom from control since some occupations, i.e., employees of construction contractors, are necessarily performed away from the premises of the employer.

10. If the **order of the performance of services** is, or may be, set by the employer, control by the employer may be indicated.

11. The **submission of regular oral or written reports** indicates control since the worker must account for his actions.

12. If **the manner of payment** is by the hour, week or month, an employer-employee relationship probably exists; whereas, payment on a commission or job basis is customary where the worker is an independent contractor. The guarantee of a minimum salary or the granting of a drawing account at stated intervals with no requirement for repayment of the excess over earning tends to indicate the existence of an employer-employee relationship.

13. Payment of the **worker's business expenses** by the employer indicates control of the worker.

14. The **furnishing of tools, materials**, etc., by the employer indicates control over the worker.

15. A significant **investment by the worker in facilities used by him in performing services for another** tends to show an independent status. And, the furnishing of all necessary facilities by the employer tends to indicate the absence of an independent status on the part of the worker. Facilities include, generally, equipment or premises necessary for the work but not tools, instruments, clothing, etc., that are commonly provided by employees in their particular trade. In order to be significant, the investment must be real, essential and adequate.

16. The **possibility of a profit or loss for the worker** as a result of his services generally shows independent contractor status. Factors that affect whether or not there is a profit or loss are whether: the worker hires, directs and pays assistants; he has his own office, equipment, materials or other facilities for doing the work; he has continuing and recurring liabilities or obligations; his success or failure depends on the relation of his receipts to his expenditures; he agrees to perform specific jobs for prices agreed upon in advance; and he pays expenses incurred in connection with the work.

17. **Working for a number of persons at the same time** often indicates independent contractor status because the worker is usually free, in such cases, from control by any of the firms. It is possible, however, that a person may work for a number of people or firms and still be an employee of one or all of them.

18. The **availability of services to the general public** usually indicates independent contractor status. This may be evidenced by the worker having his own office and assistants, hanging out a "shingle" in front of his home or office, holding business licenses, maintaining business listings in telephone directories or advertising in newspapers, trade journals, magazines, etc.

19. The **right of discharge** is that of an employer. An independent contractor, on the other hand, cannot be "fired" without incurring liability if he is producing a result that measures up to his contract specifications. A restriction on the employer's right to discharge in a labor union contract does not detract from the existence of an employment relationship.

20. The **right to quit at any time without incurring liability** indicates an employer-employee relationship. An independent contractor usually agrees to complete a specific job and he is responsible for its satisfactory completion or is legally obligated to make good for failure to complete the job.

An excellent publication, "Independent Contractor vs. Employee" (publication #NCR546) by North Central Regional Educational Materials Project is available for \$2.50 from University of Missouri Outreach and Extension Publications, 2800 Maguire, Columbia, MO 65211-0001; phone: 573/882-7216.

## **OBTAINING AN EMPLOYER IDENTIFICATION NUMBER**

Every employer maintaining an office or transacting any business in Missouri and making payment of wages to a resident or nonresident individual must obtain an Employer Tax Identification Number, which is required by federal law if you are an employer, partnership, limited liability company, or corporation. Some entities, such as financial institutions, also require a business to have an identification number. The application form (SS-4) is available from the Internal Revenue Service (IRS) in Philadelphia, PA at 866/816-2065 or from our office (1-888-751-2863) or visit their website at <http://www.irs.ustreas.gov/formspubs/index.html>

## **FEDERAL REQUIREMENTS**

### **Withholding Taxes**

Employers are generally required to withhold federal income tax, social security tax, and Medicare tax from their employee's pay. Don't forget that you are not your own employee. Officers of their own corporations can be employees, but partners and sole proprietors cannot. Guaranteed payments to partners and draws of money from a business by the owners are not wages. Partners and owners are taxed on net profits, whether or not they draw out the money. They do not withhold taxes from these profits; instead, they make quarterly payments of their estimated taxes on Form 1040-ES.

To withhold federal income tax properly from an employee's wages, employers need four pieces of information:

- amount of wages
- payroll period
- employee's marital status
- number of withholding allowances claimed by employee (W-4)
- special rules applying to particular classes of work and employees

**Citizenship**

Under current federal law, all employees hired after November 6, 1986 must verify that they are authorized to work in the United States. This includes all employees, including yourself if you are an employee of the corporation.

Employers are required by law to complete the I-9 Employment Eligibility Verification Form on every employee. The form is simple and asks that you review documents (copy of birth certificate, passport or green card) that verify the employee's identity and right to work. To obtain a copy of the I-9 or for more information about your responsibilities, call the Immigration and Naturalization Service (INS) at 1-800-755-0777. The INS also has offices in St. Louis (314/539-2532) and Kansas City (816/891-0603) or visit their website at [www.ins.usdoj.gov/graphics/index.htm](http://www.ins.usdoj.gov/graphics/index.htm).

**Employee's Withholding Allowance Certificate (W-4)**

Each employee must fill out a Form W-4 in order to have proper amounts of income tax withheld. If an employee does not fill out a Form W-4, the employer must withhold taxes as if the employee were single with no allowances.

Exemptions determine amounts not taxed on an income tax return. Withholding allowances determine amounts that decrease the tax withheld from wages. Withholding allowances claimed on the Form W-4 can be more or less than exemptions claimed on the tax return. Employers are not required to verify the accuracy of allowances claimed.

**Social Security and Medicare Taxes**

Social security is withheld only on annual wages up to a maximum of \$61,200 for each employee. The employer withholds 6.2% from wages and then pays a matching amount. The Medicare portion of FICA is withheld on all wages for each employee; the employer withholds 1.45% from wages and then pays a matching amount. An employer who hires his or her child under 18 does not have to withhold FICA from the wages nor match it. Wages paid to a spouse employed by a spouse are subject to FICA.

A sole proprietor or a partner does not withhold FICA from his draw. In these cases, payments of social security and Medicare taxes, called the self-employment tax, are figured along with the estimated income tax and normally paid during the year in four equal amounts with Form 1040-ES payment vouchers. The base is also in effect for the social security portion of the self-employed tax. The tax is figured at a rate of 15.3% (12.4% +2.9%) for 1995. However, the law allows the following two deductions:

1. A deduction of half your self-employment tax from your self-employment income in figuring your income tax. This deduction is not allowed in figuring your self-employment tax, and;
2. A deduction from your self-employment income of half of the self-employment tax rate multiplied by your net self-employment income. The deduction is not allowed in figuring your income tax.

For more information on estimating taxes, see IRS Publication 505, "Tax Withholding and Estimated Tax" ([www.irs.gov/pub/irs-pdf/p505.pdf](http://www.irs.gov/pub/irs-pdf/p505.pdf))

Social security and Medicare taxes are figured on wages without deducting withholding allowances. Marital status makes no difference. FICA is a flat 7.65% (6.2% + 1.45%) of the gross wage, up to the wage base limit. In other words, the wage is multiplied by .0765. The employer must pay a matching amount.

## STATE REQUIREMENTS

### New Hire Reporting

All employers in Missouri must report each newly hired employee to the Department of Revenue within 20 calendar days of hire. Employers may choose the form they use to report new hires. They should send a copy of the of the federal W-4 form or an equivalent form containing the following information to the Department of Revenue:

- Employee's name, address and Social Security number
- Employer's name, address and federal employer identification number (EIN)
- Employee's date of hire or the date the employee signed the W-4 form

Note: The date of hire is defined as the earlier of the date the employee signed the W-4 form, or the first date the employee reports to work, or performs labor or service.

Employers may use one of the following reporting methods:

- Mail the W-4 or equivalent form to the Missouri Department of Revenue, P.O. Box 3340, Jefferson City, Missouri 65105-3340;
- Fax copies to (573) 526-8079; or
- Electronic filing

Employers having employees in two or more states and who transmit reports magnetically or electronically may choose one of the states in which they have employment to which all new hires will be reported. The employer must notify the Secretary of the U.S. Department of Health and Human Services (DHHS), of the chosen state. DHHS is developing procedures to accomplish such selection and notification.

An employer who intentionally fails to submit information on an employee is guilty of an infraction and shall be fined not more than \$25. If the failure to report is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report, the fine shall be \$350 for each failure to report or each false or incomplete report.

Here is what happens to the reports after employers submit them:

**Department of Revenue:** The Department of Revenue staff will forward the federal W-4 form or its equivalent to the Division of Child Support Enforcement.

**Division of Child Support Enforcement:** The Division of Child Support Enforcement (DCSE) will enter new hire information into the State Directory of New Hires. DCSE staff will match names in the directory with names of non-custodial parents on record with the division. Information obtained from any employer will be held confidential and will not be published or be open to public inspection other than to public employees in the performance of their public duties.

Effective July 1, 1997 changes were made to the program as a result of the passage of the Personal Responsibility and Work Opportunity Act of 1996 (a.k.a. "Welfare Reform"). Changes in reporting requirements was necessary to speed up the child support income withholding process, to expedite support collections from obligors who change jobs frequently, to quickly locate potential obligors for paternity establishment or support order establishment and to help children regularly receive their support.

You can learn more about New Hire Reporting in Sections 285.300 through 285.306 of the Revised Statutes of Missouri or by contacting the Division of Child Support Enforcement, P.O. Box 2320, Jefferson City, MO 65102-2320 or call (573) 751-4301 or (800) 859-7999. You may also send an e-mail message to: [askcse@mail.state.mo.us](mailto:askcse@mail.state.mo.us) or visit their website at [www.works.state.mo.us/employers/newhire.htm](http://www.works.state.mo.us/employers/newhire.htm).

### **Withholding Taxes**

Every employer maintaining an office or transacting any business in Missouri and making payment of wages to a resident or nonresident individual must obtain a Missouri Employer Tax Identification Number. State tax is then withheld from the employees payroll and remitted to the Missouri Department of Revenue. For more information contact: Tax Administration Bureau, P.O. Box 999, Jefferson City, MO 65108-0999; phone: 573/751-5752.

Employers file income tax withholding returns on form MO 941 (Employer's Report of Income Taxes Withheld). Employers also file an Employer's Annual Reconciliation Report of Income Tax Withheld by January 31 of the year following the reporting year. The form is supplied by the Department of Revenue.

In addition to filing your withholding taxes by mail, the Missouri Department of Revenue offers two alternative methods:

- **Telefile** - By calling a toll free number you can file your withholding tax return using the Telefile System.
- **Electronic Data Interchange (EDI)** - EDI offers two options for filing your withholding tax return. The first option allows you to provide return information to your bank. The second option allows you to transmit your return through a value added network to the Department by use of EDI translation software.

These options are available to any Missouri taxpayer filing a Form MO-941W, Employer's Monthly Report of Quarter-Monthly Payments or Form MO-941, Employer's Return of Income Taxes Withheld. To learn more about these alternative filing methods, please contact the Tax Program Coordinator, P.O. Box 371, Jefferson City, MO 65105-0371 or call 573/751-3930 or visit thier website at [www.dor.state.mo.us/tax/business/index.htm](http://www.dor.state.mo.us/tax/business/index.htm).

The amount of withholding is based on the employee's wages, including reported tips, during the payroll period, marital status, and withholding exemptions. Employers must obtain a MO W-4 (Missouri Employee's Withholding Allowance Certificate) from each employee at the time work begins. Employees who do not complete the form are subject to withholding at the rate for single persons with no exemptions. Employees are entitled to the same number of personal and dependent exemptions on the state level as they are for federal withholdings.

Employers are required to keep records for all of their employees, including their names, addresses, Social Security numbers, period of employment, and dates and amount of wages subject to withholding.

In addition to state income tax withholdings, some municipalities impose an earnings tax on wages, salaries, other remuneration of city residents and of nonresidents working in the city. To register with the Missouri Department of Revenue and receive an employer withholding tax number, request a copy of form 2643 (same form to obtain a sales tax number and a corporate income tax number). This form is available via the Web or can be requested from our office. The Department of Revenue also produces a publication, "Employer's Tax Guide" that includes instructions and reporting forms. The Guide is available from the Department of Revenue by calling 1-800-877-6881 or sending an e-mail request to [withholding@mail.dor.state.mo.us](mailto:withholding@mail.dor.state.mo.us) or from their website at [www.dor.state.mo.us/tax/business/withhold/forms/](http://www.dor.state.mo.us/tax/business/withhold/forms/).

### **Unemployment Insurance Tax Liability**

The Missouri Division of Employment Security is the state agency responsible for the administration of the unemployment insurance benefit and tax program. The Division has responsibility to both workers and employers.

**Who Is A Liable Employer?** The term "liable employer" refers to an employing unit that has become liable to cover workers for unemployment insurance benefits and to pay unemployment taxes on the workers' wages.

The Division uses the form MODES-2699, Report to Determine Liability Status, to gather information to determine whether an entity is liable for state unemployment tax. An entity that employs workers is required to complete and return this form.

If liable for state unemployment tax, the Division will mail an official written determination of liability and quarterly contribution and wage reports on which to report the wages of employees. As an employer, an entity must file contribution and wage reports each calendar quarter.

### **How Is Liability Established?**

To establish liability an employing unit must meet one or more of the following criteria:

#### **1. General Business Employer**

- By having a total payroll of \$1500 or more in a calendar quarter during either the current or preceding calendar year;
- By employing a worker for some portion of a day in each of 20 different weeks in either the current or preceding calendar year;
- By acquiring and continuing without interruption substantially all the business of another employer (Applies to all types of employers.);
- By being liable under the Federal Unemployment Tax Act and employing a worker in Missouri. (Applies also to agricultural and domestic employment.) The reporting requirements of the Federal Unemployment Tax Act (FUTA) are similar to those of Missouri unemployment tax, but are not identical. Federal

unemployment tax is administered by the Internal Revenue Service. Contact the IRS for information on your liabilities for federal unemployment tax.

2. Domestic Employer

An employer of a domestic or household worker in a private home, college sorority or fraternity, becomes liable when \$1,000 or more in cash wages are paid in a calendar quarter during the current or preceding calendar year.

3. Agricultural Employer

An agricultural employer who, in all states combined, has 10 or more workers in 20 different weeks or pays \$20,000 or more in cash wages in a calendar quarter, during the current or preceding year, becomes liable to cover workers and pay unemployment taxes.

4. Nonprofit Organization 501(c)(3)

A nonprofit organization described in 501(c)(3) of the Internal Revenue Code becomes liable if in Missouri, it employs four or more workers for some portion of a day in 20 different weeks during the current or preceding calendar year.

5. Government Employer

A governmental entity is liable when it employs a worker regardless of the amount of wages paid or number of weeks workers are employed. For additional information, visit their web site at [www.mouitax.com](http://www.mouitax.com) or [www.dolir.state.mo.us/es/dolir4b.htm](http://www.dolir.state.mo.us/es/dolir4b.htm) or request a copy of the booklet "Employers' Rights and Responsibilities" from the Division of Employment Security, PO Box 59, Jefferson City, MO 65104-0059; (573) 751-3215.

### **Worker's Compensation**

All businesses with five or more employees (except agricultural or domestic labor) must provide worker's compensation insurance to protect their workers in case of job-related injury, illness or death. Construction companies need workers compensation insurance if they have one or more employees. Companies can offer this protection through a private insurance carrier or they can become self-insurers. Premium rates vary, depending on the risks associated with special occupations. As in most states, the premium rates apply to an employee's total annual salary. The maximum weekly benefit for temporary total disability, temporary partial disability, permanent total disability and death is currently computed as 105 percent of the average weekly wage, determined annually on July 1. Missouri's worker's compensation rates compare favorably with those in other states. Though benefits for claimants in other states usually increase automatically from year to year, in Missouri benefits cannot be increased without the review and approval of the state legislature.

In making the decision to enter into a new business venture, workers' compensation liability should be a primary area of concern. This article will provide some basic information regarding workers' compensation and will then pose and answer a number of questions such as might be asked of any attorney or insurance agent by any person entering into a small business enterprise.

The workers' compensation system is a statutorily created, state administered, no-fault program which constitutes an injured employee's sole remedy against the employer and which protects the employer from tort liability. The system is not intended to constitute a form of general health insurance. Rather, the system exists for the purpose of compensating employees who are injured, or who contract occupational diseases, which arise out of and in the course of employment. The law is liberally construed to bring the largest possible class of employers, employees and injuries under its provisions.

Furthermore, there is no limitation as to the kinds of injuries or diseases that might be found to be compensable. The term "injury" has been found to include, along with the usual lacerations, contusions, fractures, strains, and certain occupational diseases, to also include repetitive motion

disease, some heart attacks and mental injuries, injuries as a result of exposure to fumes or weather, even injuries that occur as a result of misbehavior, involve intoxication or altercations among employees, the term can even include the results of sexual assault. But for a few exemptions, all kinds of businesses are subject to the law and in all likelihood the business which you are contemplating starting up will similarly be included. Thus, you should ask yourself the following questions and understand the following coverage principles.

*Will my business be subject to the law?*

Every employer with five or more employees regularly employed is under the workers' compensation law. For many decades the law could be rejected, that is no longer true. Similarly, the nature of the business makes no difference, the law applies equally to hazardous employment versus non-hazardous, businesses operated for profit, corporations, partnerships, joint ventures and sole proprietorships. The only employment exempted, regardless of the number of workers, are farm labor, domestic servants in a private home or occasional labor performed for and related to a private household. Those exempted employments, and employers with less than five employees regularly employed, can come under the law by election, or may become subject to the law, by purchasing workers' compensation insurance. The wisest course is to assume that your business will be under the law unless you are certain that it will not be and you are comfortable under those circumstances.

*Must my business have workers' compensation insurance?*

Every employer under the law must either purchase and maintain valid workers' compensation insurance coverage or qualify as a self-insurer, either individually or as a member of a group. To be self-insured, state approval must be obtained and if an employer has not demonstrated the necessary qualifications and obtained the requisite approval, the employer is "bare" regardless of the employer's actual financial ability to pay claims.

*What happens if my business does not have worker's compensation insurance, and is not a qualified self-insurer, should an injury occur?*

If an employer subject to the law fails to insure or self-insure, the penalties are considerable. First of all, under those circumstances the injured employee has a right to either pursue the workers' compensation remedy or to file a civil suit for damages. In the event that the latter course of action is taken, the employer may not interpose defenses such as the negligence of a fellow servant or the employee's contributory fault. If the employee elects to pursue a workers' compensation claim, the law provides that all compensation shall be immediately computed and payable and the award can then be certified as a judgment and the employer's assets attached.

*What if I decide I do not want to continue workers' compensation insurance and my business is small enough that I do not have to have coverage?*

If an employer, not automatically under the law, chooses to accept the law, that acceptance remains in force until that acceptance is withdrawn through a formal filing with the Division of Workers' Compensation. Perhaps more importantly, if a business purchases workers' compensation coverage, the employer automatically comes under the law and that status will continue even if the insurance policy is canceled or not renewed. Consequently, any employer who can opt out must be certain to notify the state even if the business accepted the law only the business' previous purchase of insurance coverage.

*Who must the business count as an employee?*

Anyone to whom the business pays a salary or wage for services performed must be considered an employee and the term can even include those who work for no pay at all. Partners and sole proprietors are not counted and executive officers only if the officers perform actual services for

the business or are subjected to the hazards of the industry. In addition, it is not necessary that all employees to be counted be employed at the same moment in time, employees employed on a staggered basis, but employed to work on a single project, may all be counted to determine whether the business has or had five or more employees "regularly employed."

*Can my business avoid being under the law through the use of independent contractors?*

The use of contracting as a technique to avoid workers' compensation exposure is very risky at best. There is a provision in the law intended to prevent this practice. This provision creates "statutory" or presumptive employment in circumstances where a business contracts to have work performed on its premises which is the normal course of the work of that business. If those three criteria are met, the "statutory employer" becomes liable to provide workers' compensation benefits to uninsured subcontractors or the employees of uninsured subcontractors. Although this provision primarily affects the construction industry, it applies to all employments exempting only landowners who are having improvements erected, repaired, altered or demolished. Moreover, the term "employee" is very liberally construed under the state workers' compensation law and many individuals would be deemed as direct employees of a business even though they might be accepted as independent contractors under other statutes or regulations, i.e., by the IRS. In other words, you cannot conduct your usual business through the use of independent contractors and escape workers' compensation liability.

*If my business comes under the law, am I safe from civil suits in the event that an employee is injured?*

As a rule, if workers' compensation jurisdiction applies, the employer cannot be sued under civil law, either directly or indirectly. However, there are a few exceptions. One exception involves intentional torts such as an assault. Another exception involves the situation where the employer leaves the role of the employer and steps into the role of a co-employee and while working in that capacity causes injury. There, the employer or an individual manager may be subject to suit and the employer's insurance coverage may not apply. Fortunately, however, the Missouri courts have allowed only a few exceptions to the rule of "exclusivity" and the fact of workers' compensation jurisdiction affords the business immunity from a civil judgment for damages on account of a work-related injury.

In conclusion, every business person must be cognizant of worker's compensation liability. No business can avoid exposure to the costs of work-related injury and even those businesses who are sufficiently small not to automatically come under the law, should seriously consider electing workers' compensation coverage since liability for work-related injury or disease exists even in the absence of workers' compensation jurisdiction. The trade-off, the obligation to supply workers' compensation benefits in exchange for limited damages, remains a good bargain for both the business and its workers.

*This article, written by James B. Kennedy, appeared in the St. Louis Business Journal and is re-printed with their permission. You can obtain further information from the Missouri Division of Workers' Compensation at 1-800-775-2667 or consult with your attorney or insurance representative, web site: [www.dolir.state.mo.us/wc/index.htm](http://www.dolir.state.mo.us/wc/index.htm).*

## **OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)**

All employers must furnish to employees employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious harm to employees. Employers must comply with occupational safety and health standards issued under the Act. Employees must comply with all occupational safety and health standards, rules, regulations and orders issued under the Act that apply to their own actions and conduct on the job.

The Act requires that a representative of the employer and a representative authorized by the employees be given an opportunity to accompany the OSHA inspector for the purpose of aiding the inspection. Where there is no authorized employee representative, the OSHA Compliance Officer must consult with a reasonable number of employees concerning safety and health conditions in the workplace.

Employees or their representatives have the right to file a complaint with the nearest OSHA office requesting an inspection. If they believe unsafe or unhealthful conditions exist in their workplace, OSHA will withhold, on request, names of employees complaining. The Act provides that employees must not be discharged or discriminated against in any way for filing safety and health complaints or for otherwise exercising their rights under the Act.

If upon inspection OSHA believes an employer has violated the Act, a citation alleging such violations will be issued to the employer. Each citation will specify a time period within which the alleged violation must be corrected. The OSHA citation must be prominently displayed at or near the place of alleged violation for three days, or until it is corrected, whichever is later, to warn employees of dangers that may exist there.

The Act provides for mandatory civil penalties against employers of up to \$7,000 for each serious violation and for optional penalties of up to \$7,000 for each nonserious violation. Penalties of up to \$7,000 per day may be proposed for failure to correct violations within the proposed time period and for each day the violation continues beyond the prescribed abatement date. Also, any employer who willfully or repeatedly violates the Act may be assessed penalties of up to \$70,000 for each such violation. A minimum penalty of \$5,000 may be imposed for each willful violation. A violation of posting requirements can bring a penalty of up to \$7,000. There are also provisions for criminal penalties.

Free assistance in identifying and correcting hazards and in improving safety and health management is available to employers, without citation or penalty, through OSHA-supported programs in each State. In Missouri contact: Department of Labor and Industrial Relations, Division of Labor Standards, 3315 West Truman Blvd., P.O. Box 449, Jefferson City, MO 65102; phone: 573/751-3403 or 1-800-475-2130, website: [www.dolir.state.mo.us/lis/onsite/index.html](http://www.dolir.state.mo.us/lis/onsite/index.html). Additional information and copies of the Act, specific OSHA safety and health standards and other applicable regulations may be obtained from the OSHA regional office in Kansas City, MO at 816/426-5861.

If you are a small business subject to OSHA regulations, the OSHA Handbook for Small Business will give your business the information it needs to comply with federal occupational safety and health law. You can order by mail from the Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954. Ask for publication #029-016-00144-1. The cost is \$4.00 per copy, postpaid. Orders charged by Visa or MasterCard may be placed by phone at (202) 783-3238 between 8 a.m. and 4 p.m. Eastern time.

### **INTERNAL REVENUE SERVICE (IRS) ASSISTANCE AND PUBLICATIONS**

While the IRS is the source of much consternation for many of us, they also provide a great deal of helpful information and assistance to the small business owner. The IRS even has a web site ([www.irs.ustreas.gov/formspubs/index.html](http://www.irs.ustreas.gov/formspubs/index.html)) where you can retrieve:

- variety of forms
- IRS publications
- newsletters

- a business tax kit
- Tax Information for Business

It is definitely worth the visit!

Alternatively you can obtain a "business tax kit" and a copy of "Circular E, Employer's Tax Guide" from your local IRS office or calling 1-800-829-3676. You may also visit their website at [www.irs.ustreas.gov/formspubs/index.html](http://www.irs.ustreas.gov/formspubs/index.html). "Circular E" explains federal tax withholding and Social Security tax requirements for employers as well as containing up-to-date withholding tables for you to use to determine how much federal income tax and Social Security tax is to be withheld from each employee's paycheck.